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5 **IN THE UNITED STATES DISTRICT COURT**
6 **FOR THE DISTRICT OF ARIZONA**
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8 Wayne F. Foraker,)	No. CV- 04-2614-PHX-DGC
9 Plaintiff,)	
10 vs.)	ORDER
11 Apollo Group, Inc. dba University)	
12 of Phoenix,)	
13 Defendant.)	

14 On September 1, 2006, the jury in this case unanimously concluded that Plaintiff had
15 been denied a promotion and a 10% pay increase for taking his 2004 leave under the Family
16 Medical Leave Act (“FMLA”). Dkt. #223. The jury also concluded that Plaintiff was placed
17 on paid administrative leave for requesting additional FMLA leave in 2005. *Id.* With respect
18 to both of these actions, the jury found that Defendant acted in bad faith. *Id.*

19 When a violation of the FMLA has been established, the statute expressly authorizes
20 injunctive relief. Employers who violate the statute are liable for economic damages or “for
21 such equitable relief as may be appropriate, including employment, reinstatement, and
22 promotion.” 29 U.S.C. § 2617(a)(1)(B).

23 Plaintiff seeks equitable relief. Dkt. #257. In light of the jury’s verdict and the
24 availability of such relief under the FMLA, the Court entered an order on December 21,
25 2006, requiring that Defendant “end Plaintiff’s paid administrative leave and . . . return him
26 to full-time employment, either (at Defendant’s election) in the position he previously held
27 (Senior Director of Learning Assessment) or an ‘equivalent’ position within the meaning of
28 29 U.S.C. § 2614(a)(1)(B).” Dkt. #261.

1 Defendant responded by offering Plaintiff two positions: Senior Director of Academic
2 Quality and Assurance at Western International University (“WIU”) and Senior Director of
3 Academic Quality and Assurance at the Institute for Professional Development (“IPD”).
4 Plaintiff declined to accept these positions, concluding that they are not “equivalent” to the
5 position he was promised by Defendant.

6 The parties have filed briefs and exhibits (Dkt. ##284, 286), and the Court held an
7 evidentiary hearing on March 7, 2007, receiving testimony from four witnesses and hearing
8 arguments from counsel. The Court concludes that the positions offered by Defendant are
9 not equivalent within the meaning of the FMLA or the Court’s prior order.

10 **1. Plaintiff’s Promised Position.**

11 The University of Phoenix is a wholly owned subsidiary of Defendant Apollo Group,
12 Inc. Plaintiff has been employed in various positions at the University for approximately 13
13 years. The jury found that Plaintiff was given the position of Senior Director of Learning
14 Assessment for the University in early 2004.

15 The University of Phoenix has approximately 300,000 students. As the Senior
16 Director of Learning Assessment, Plaintiff was to oversee learning assessment programs for
17 the entire University, covering the four schools and seven colleges within the University.
18 Although Plaintiff’s position was new, the learning assessment function was not. Plaintiff
19 was assuming responsibilities previously held by Dean Liz Tice, who had left the University.
20 Plaintiff’s responsibilities included preparing a budget for the learning assessment
21 department, managing the cost center for the department, staffing the department, and
22 supervising the employees who would be associated with the department. Dkt. #238 at 114.
23 Plaintiff was to work with the Information Technology Director to establish a technology
24 platform from which to conduct the assessment work. *Id.* At the outset, Plaintiff supervised
25 one employee, Debbie Reimer. *Id.* at 139. It was anticipated that he would hire additional
26 employees for the department.

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1 § 2614(a)(1)(B). Congress has authorized the Department of Labor to issue regulations
2 implementing these terms. *Xin Liu v. Amway Corp.*, 347 F.3d 1125, 1133 (9th Cir. 2003)
3 (citing 29 U.S.C. § 2654). The regulations are entitled to deference. *Id.* They define an
4 “equivalent position” in these words:

5 An equivalent position is one that is virtually identical to the
6 employee’s former position in terms of pay, benefits and working conditions,
7 including privileges, perquisites and status. It must involve the same or
8 substantially similar duties and responsibilities, which must entail substantially
9 equivalent skill, effort, responsibility, and authority.

10 29 C.F.R. § 825.215(a). The regulations also provide that “[a]n equivalent position must
11 have substantially similar duties, conditions, responsibilities, privileges, and status as the
12 employee’s original position.” 29 C.F.R. § 825.215(e).

13 The Court concludes that the two positions offered by Defendant do not have
14 responsibilities, authority, privileges, and status substantially similar to the position of Senior
15 Director of Learning Assessment at the University. Although the offered positions have the
16 same salary, benefit, and job classification, the Court cannot conclude that responsibility for
17 learning assessment across four schools and seven colleges, spanning 300,000 students, is
18 substantially the same as conducting research within IPD or preparing for an assessment of
19 the 4,500-student WIU. The latter jobs do not have the same level of responsibility,
20 authority, status, and privileges as the position the jury found to have been promised Plaintiff
21 and denied him in bad faith. The Court accordingly concludes that Defendant has not offered
22 Plaintiff positions equivalent to the promotion wrongfully denied him under the FMLA.

23 The Court has reviewed cases cited by the parties and identified through the Court’s
24 own research. The Court concludes that this case is most similar to *Donahoo v. Master Data*
25 *Center*, 282 F.Supp.2d 540 (E.D. Mich. 2003). The plaintiff in *Donahoo* worked as a
26 computer analyst prior to taking leave under the FMLA. Upon returning to work, the
27 plaintiff was assigned a data-entry position. The district court held that the positions were not
28 equivalent:

1 Defendant argues that plaintiff's new position carried equal pay and benefits
2 to her former position and therefore the two are equivalent. While that may be
3 true, the regulation also requires equivalent status, and the two positions were
not equivalent in terms of status: a data-entry job is not as sophisticated, nor
does it require a similar level of training and education, as a computer analyst.

4 *Id.* at 552.

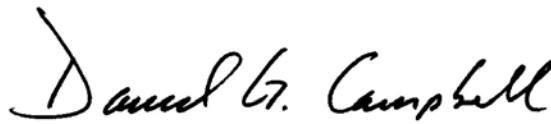
5 Other courts have found that plaintiffs were offered equivalent positions even though
6 the new positions differed from their previous jobs. In each case the court found that the
7 differences were *de minimis*. See, e.g., *Smith v. East Baton Rouge Parish School Board*, 453
8 F.3d 650, 652 (5th Cir. 2006) (reduction in travel a *de minimis* difference); *Montgomery v.*
9 *Maryland*, 266 F.3d 334, 341-42 (4th Cir. 2001) (vacated on other grounds by *Montgomery*
10 *v. Maryland*, 535 U.S. 1075 (2002)) (changes in administrative duties *de minimis*); *Oby v.*
11 *Baton Rouge Marriott*, 329 F.Supp.2d 772, 779-82 (N.D. La. 2004) (no evidence that change
12 in supervisory responsibilities was significant); *Hillstrom v. Best Western TLC Hotel*, 265
13 F.Supp.2d 117, 126-27 (D. Mass. 2003) (loss of private office and change of reporting line
14 *de minimis*). The Court has considered these cases carefully and cannot conclude that the
15 *de minimis* characterization applies to the differences between Plaintiff's promised position
16 and the jobs offered at WIU and IPD. Directing learning assessment for the entire 300,000-
17 student University of Phoenix is more than minimally different from conducting research at
18 IPD or preparing for an assessment of the 4,500-student WIU.

19 Because the Court is exceedingly reluctant to venture into the business of prescribing
20 jobs within a company, it will give Defendant one more opportunity to provide Plaintiff with
21 an equivalent position. On or before **April 6, 2007**, Defendant shall either offer to Plaintiff
22 the position of Senior Director of Learning Assessment he was previously promised, or shall
23 offer him an equivalent position within the University of Phoenix. The equivalent position
24 must not only include the same pay, benefits, and job classification, but must also be
25 substantially similar in responsibilities, authority, status, and privileges. Plaintiff shall have
26 until **April 20, 2007** to accept the new position. If Plaintiff does not accept the new position
27 by that date, the parties shall jointly notify the court on **April 23, 2007**, that the position has
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1 not been accepted. The Court will then schedule a hearing to finally resolve the matter.

2 A few words of guidance: The Court recognizes that the new position need not be
3 identical to the promotion Plaintiff was denied in order to be equivalent. As this order should
4 make clear, however, offering Plaintiff a position in a much smaller institution with much
5 less substantial responsibilities will not be found by the Court to satisfy the equivalency
6 requirement. Plaintiff should also recognize, however, that the Court will not be inclined to
7 require Defendant to re-create the now-abolished position of Senior Director of Learning
8 Assessment if a substantially similar position has been offered to Plaintiff within the
9 University of Phoenix.

10 DATED this 12th day of March, 2007.

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15 David G. Campbell
16 United States District Judge
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